NATIONAL PARK SERVICE

IBLA 89-49 Decided January 9, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-51175.

Set aside and remanded.

1. Alaska: Native Allotments

An assertion by a Native allotment applicant that he used four different parcels that are separated by significant distances during the same time period is doubtful. Where the asserted occupancy is for only 13 days (and is likely less), and no improvements were placed on the parcel, the applicant has failed to demonstrate substantially continuous use and occupancy at least potentially exclusive of others. A decision by BLM approving an allotment for the parcel is properly set aside and the case remanded for initiation of a Government contest against the application for the parcel.

2. Alaska: Native Allotments

A BLM decision that a Native allotment applicant has satisfied the occupancy requirements of the Native Allotment Act based on (1) existence of a cabin on the parcel, and (2) the applicant's assertion that he occupied the parcel 18 days a year will be set aside and the case remanded for further investigation where the record shows that the applicant's occupancy was likely less than 18 days and there is no evidence either that the applicant owned the cabin or that the condition of the cabin was such that it did not appear to be abandoned. On remand, BLM should consider other relevant factors, as the presence of a cabin does not by itself render occupancy qualifying.

APPEARANCES: F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the National Park Service.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The National Park Service (NPS) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 14, 1988, partially approving the Native allotment application of Lewis Vanderpool (AA-51175).

On August 19, 1983, 1/ Vanderpool filed his Native allotment application for four parcels of land (A, B, C, and D) totalling 160 acres, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (the Native Allotment Act). 2/ BLM's decision approved his application for Parcels A, B, and C only. 3/ NPS has challenged BLM's decision only as to Parcels B and C, and our review is accordingly limited to these parcels.

1/ Vanderpool's allotment application was not preserved by the savings clause of section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), because it was filed subsequent to Dec. 18, 1971. However, the record contains a copy of an Aug. 2, 1982, settlement reached by the parties in Barr v. United States, No. A76-160 (D. Alaska). In that case, Alaska Legal Services Corporation represented a class of Native allotment applicants who had submitted applications to a RuralCAP worker before Dec. 18, 1971, but whose applications had not been timely filed with the Department. The stipulated settlement provided that their applications would be deemed to be timely because they were able to establish to the court's satisfaction that they had filled out applications and given them to a RuralCAP worker before Dec. 18, 1971. The settlement was approved by the court on Oct. 8, 1982. The record contains certification from the Bureau of Indian Affairs that Vanderpool is a "Barr applicant."

2/ The Native Allotment Act was repealed, subject to applications pending on Dec. 18, 1971, by section 18(a) of ANCSA.

As described in the allotment application, the parcels are situated as follows: Parcel A: Protracted Sec. 7, T. 24 N., R. 44 W.; Parcel B: Protracted Secs. 5, 6, and 8, T. 10 N., R. 26 W.; Parcel C: Protracted Secs. 6 and 7, T. 6 N., R. 26 W.; and Parcel D: Protracted Sec. 31, T. 5 N., R. 56 W. The lands are all unsurveyed and these descriptions are in relation to the Seward Meridian.

Parcels B and C are located in the Lake Clark National Park and Preserve, which was created by Congress on Dec. 2, 1980, pursuant to section 201(7) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh(7) (1988).

3/ The record indicates that the land in Parcel D had been selected by the State of Alaska on Feb. 1, 1972 (pursuant to selection application F-15348), and was subsequently conveyed to the State on Nov. 13, 1975 (Patent No. 50-76-0040). By letter dated Sept. 14, 1988, BLM notified Vanderpool that, in accordance with Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), it would determine the validity of his claim to Parcel D under the Native Allotment Act, and, thus, whether to pursue recovery of the title to that land. Thus, BLM postponed adjudication of Parcel D.

The application, signed by Vanderpool on June 2, 1983, indicated that he had used Parcels B and C for the following time periods and purposes: Parcel B: each year from 1960 through 1980 from August 20 through September 1 (13 days) for hunting; and Parcel C: each year from 1960 through 1983 from August 15 through September 1 (18 days) for hunting. The application indicated that there was a cabin on Parcel C constructed in 1960.

A field examination of Parcels B and C was conducted by a BLM natural resource specialist in the company of one or both of Vanderpool's brothers, on June 11, 1984. None of the parcels was found to have been posted by the applicant, but were posted during the examination. On Parcel B, situated on a peninsula jutting into Lake Telaquana, the BLM examiner found no improvements, reporting that the "applicant uses a tent at this site" (Land Report dated July 24, 1984 (Parcel B) at 2). The only evidence of use was a fuel cache and some trash. On Parcel C, situated on the shores of the Twin Lakes, the BLM examiner found a cabin, but no other improvements. He noted some signs of use around the cabin, but did not specify what they were (Land Report dated July 24, 1984 (Parcel C) at 3). The BLM examiner stated that there were no known conflicts with the applicant's exclusive use of either parcel and concluded that, "[b]ased upon the information available to me, this [applicant] has met the use and occupancy requirements set forth in the Native Allotment Act" and recommended that BLM approve the allotment application as to both parcels. The land reports were approved by the Area Manager, McGrath Resource Area, BLM, on September 20, 1984. These reports provide the only basis for BLM's decision to approve the allotment.

In its September 1988 decision, BLM concluded that, as provided by section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1988), the application for Parcels B and C could not be considered legislatively approved because the land was within a unit of NPS established on or before December 2, 1980, and was not withdrawn pursuant to section 11(a)(1) of ANCSA, 43 U.S.C. § 1610(a)(1) (1988): "Based upon adjudication of Parcels B and C of the application, this office has determined that * * * the applicant has satisfied the use and occupancy requirements of the [Native Allotment Act]. Therefore, Native allotment application AA-51175, Parcels B and C are hereby approved." BLM stated that, as a result of its conclusion, the land would be surveyed and a certificate of allotment issued to the applicant.

In its statement of reasons for appeal (SOR), NPS contends primarily that BLM improperly concluded that Vanderpool had satisfied the use and occupancy requirements of the Native Allotment Act. In particular, NPS asserts that, even assuming Vanderpool used Parcels B and C for approximately 2 weeks each year as stated on his application, his use was not "substantially continuous" as required by the Act, citing United States v. Estabrook, 94 IBLA 38 (1986). In addition, NPS argues that Vanderpool did not use and occupy the parcels to the potential exclusion of others, as required by 43 CFR 2561.0-5(a) (1983). Therefore, NPS requests that we reverse the September 1988 BLM decision approving the allotment application as to Parcels B and C.

Section 1 of the Native Allotment Act, as amended, 43 U.S.C. § 270-1 (1970), authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved non-mineral land to a Native Alaskan. In order to be entitled to an allotment, under section 3 of the Native Allotment Act, as amended, 43 U.S.C. § 270-3 (1970), the applicant was required to submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." The Department has interpreted that to mean that the applicant must demonstrate "the customary seasonality of use and occupancy," which "must be substantial actual possession and
use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a) (1983).

It is well established that a Native allotment applicant bears the burden of establishing his entitlement under the Native Allotment Act and applicable Departmental regulations by a preponderance of the evidence. See State of Alaska, 113 IBLA 80, 84 (1990). We conclude that the record does not support the September 1988 BLM decision that Vanderpool had satisfied this burden for Parcels B and C. Neither the September 1988 BLM decision, nor the applicable BLM land reports upon which it was based, contains any stated rationale supporting BLM's conclusion that the applicant had substantially and continuously used the parcels at least potentially exclusive of others. We find that, for Parcel B, the record indicates that the contrary is true and that, for Parcel C, the record is inconclusive.

[1] We have held that, "[a]s a matter of law, mere use of the land for a few days each year, absent any physical improvements, does not constitute substantially continuous use and occupancy potentially exclusive
of others." Angeline Galbraith, 97 IBLA 132, 165-66, 94 I.D. 151, 169 (1987). Such short-term use alone does not amount to substantial use of
the land and, where it does not put others on notice that land is being used, does not potentially exclude them within the meaning of 43 CFR 2561.0-5(a) (1983). See Angeline Galbraith, supra at 168, 94 I.D. at 170; Angeline Galbraith (On Reconsideration), 105 IBLA 333, 338 (1988). 4/

Thus, in United States v. Estabrook, supra at 45-47, we held that use of claimed land as a base camp for hunting from two to five times a year for a period of from a few days to 2 weeks was not sufficient. Similarly, in State of Alaska, supra at 82 and 84, we held that several trips to claimed land for hunting purposes each fall, each trip lasting a few days, was also not sufficient. Such use amounts to "merely intermittent use," which is not sufficient under 43 CFR 2561.0-5(a) (1983). See also Jack Gosuk, 22 IBLA 392, 395 (1975); Gregory Anelon, Sr., 21 IBLA 230, 232 (1975).

4/ The use and occupancy by Native Alaskans entitled to protection under sec. 8 of the Act of May 17, 1884, 23 Stat. 26 (1884), the predecessor to the Native Allotment Act, has been interpreted to be "of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another." United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948).

The record establishes that, at most, Vanderpool used Parcel B approximately 2 weeks each year for hunting, with the only evidence of man's presence on the land being a fuel cache and some trash. Only one visit per year was asserted.

According to Vanderpool's allotment application, from 1962 through 1980, he used Parcels B, C, and D simultaneously during the period from August 20 to September 1. NPS argues persuasively that it is likely that Vanderpool used the land in Parcel B less than 2 weeks per year, considering the distance between Parcels B, C, and D and the fact that he was assertedly using them at the same time (SOR at 7). Thus, NPS points out that, presuming the protracted townships to be 6 miles across, Parcels B and C are 24 miles apart and Parcel D is approximately 180 miles west of Parcels B and C: "A certain amount of time was invested in simply traveling from one parcel to another, further diminishing the amount of time potentially spent on any one parcel." Id. Given the distances between
the parcels, we agree that it is very unlikely that Vanderpool's use of the land amounted to the full 2 weeks of occupancy he claimed for each year.

Further, we find that the signs of use of Parcel B were so negligible that it is unlikely that they would alert anyone to the fact that the land was being used. The fuel cache and trash could have simply signified the causal use of someone passing through the land, rather than use by one intending to occupy it. They amount to no more evidence of use, when considered in connection with the limited extent of use, than the meat and fish-drying racks, boat dock, cleared campground, lean-to and tent frame used each year by at least one of the applicants in Estabrook, supra, or the temporary drying racks purportedly left behind each year by the applicant in State of Alaska, supra, neither of which was found sufficient to establish qualifying use under the Native Allotment Act. Moreover, the short time spent on the land does not itself constitute substantial possession and use of the land. Therefore, we conclude that BLM erred as a matter of law in determining that Vanderpool had in fact substantially
and continuously used and occupied Parcel B to the potential exclusion of others, as required by the Native Allotment Act and applicable Departmental regulations.

Where, on appeal, the evidence is found to be insufficient to support BLM's decision approving a Native allotment application and instead indicates that the application should be rejected, the proper course of action is to set the decision aside and remand the case to BLM for initiation of
a Government contest, so that the applicant may be afforded the procedural protections required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). See State of Alaska, supra at 84 (referring to Donald Peters, 26 IBLA 235, 83 I.D. 308, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), aff'd, Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978)). Accordingly, we set aside the September 1988 BLM decision to the extent that it approved Native allotment application AA-51175 as to parcel B and remand the case to BLM for initiation of a contest with respect to that parcel. See Pedro Bay Corp., 88 IBLA 349, 354-55 (1985).

[2] Parcel C presents a different case. Vanderpool used Parcel C at most only infrequently and for short terms between 1960 and 1983. His alleged use of the land was for less than 3 weeks one time each year, and his actual use was doubtlessly less. 5/ We do not regard such use as sufficient to meet statutory and regulatory requirements. However, there was a significant physical improvement placed on Parcel C in 1960, viz., a cabin, which Vanderpool valued at $1,000.

A cabin, being a distinct physical improvement, generally indicates that its owner claims the land on which it rests:

> A claimant need not show that he or she actually excluded others from using the land sought; rather, a claimant must show that the nature of the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. Thus, * * * the presence of physical structures * * * might well engender a recognition that someone was appropriating the land.

Angeline Galbraith, supra at 169, 94 I.D. at 171; see also Angeline Galbraith (On Reconsideration), supra at 334-35. Further, such claim would normally persist as long as the cabin remains on the land. Given some occupancy and use by the owner, a cabin would generally constitute substantial actual possession and use of the underlying land. Thus, existence of a cabin, together with the brief use by a Native allotment applicant during the course of a year, might amount to qualifying use and occupancy of at least a 40-acre subdivision of land. See Emily B. Hunt, 23 IBLA 205, 206 (1976); Hilma Eakon, 22 IBLA 41, 42 (1975). Accordingly, Vanderpool's claim to Parcel C does not fail as a matter of law.

NPS discounts the significance of the cabin, arguing: "The existence of the cabin on parcel C does not elevate the sporadic use to substantial use. There is no evidence that the applicant built the cabin, kept personal effects in it, or otherwise considered it his own" (SOR at 7). Thus, NPS contends that "[t]he evidence of an unoccupied hunting cabin is insufficient to put others on notice of the applicant's claim." Id. at 8.

NPS has presented no evidence that Vanderpool did not build the cabin or that he did not keep personal effects in it. 6/ Nevertheless, we agree that the record shows only that a cabin exists on Parcel C and that Vanderpool regards it to be his. The file contains no indication of who

5/ Just as it is questionable whether Vanderpool actually used Parcel B for the full asserted period of 13 days, due to the great distance between the four parcels he claims to have used contemporaneously (see discussion above), it is questionable whether he used Parcel C for the full asserted period of 18 days.
6/ We appreciate that it was up to BLM, not NPS, to investigate such questions. These questions should be pursued by BLM during the course of the further proceedings ordered herein.

built or used the cabin and no assessment of its condition during the time use was alleged. NPS points out that BLM did not include a photograph of the cabin in the record. The applicable land report does contain an aerial photograph of the cabin, but it is barely visible through a stand of trees, with only a portion of the roof and exterior walls showing. The BLM examiner noted the presence of the cabin in his report regarding Parcel C, locating it on a "Site Plot" of the parcel, but did not describe it.

The history and ownership of the cabin are relevant to the question who was claiming the parcel. Angeline Galbraith, supra at 169, 94 I.D. at 171. Of course, if the cabin were built and/or owned by someone other than Vanderpool, it could hardly be said that its presence on the parcel indicated that Vanderpool was claiming the land. Likewise, the condition of the cabin is relevant to the issue of whether Vanderpool demonstrated qualifying use: if the cabin were in extensive disrepair, that might indicate that the site had been used and then abandoned. In these circumstances, BLM could properly conclude that the applicant had ceased his qualifying use and occupancy and, thus, was no longer entitled to an allotment. See United States v. Flynn, 53 IBLA 208, 237-39, 88 I.D. 373, 389-90 (1981).

Furthermore, in general, the existence of a cabin is but one factor to consider in determining whether a Native allotment applicant has substantially used and occupied a parcel for the requisite time period. See John Nanalook, 17 IBLA 353, 357 n.3 (1974) (quoting field examination guidelines concerning "substantial use and occupancy"). The existence of a cabin does not, by itself, establish compliance with the statute and applicable Departmental regulations, as this fact may be outweighed by other factors indicating that the occupancy was not qualifying. Ouzinkie Native Corp., 83 IBLA 225, 227, 230-31 (1984); Pedro Bay Corp., 78 IBLA 196, 203 (1984); but see Angeline Galbraith (On Reconsideration), supra at 338.

Accordingly, in view of BLM's failure to address these questions or to adequately assemble background information on the cabin on Parcel C, we cannot affirm BLM's conclusion that Vanderpool's intermittent short-term use of Parcel C, even coupled with the existence of a cabin on the parcel, amounted to substantial actual possession and use to the potential exclusion of others. Therefore, we set aside BLM's decision to the extent that it approved Native allotment application AA-51175 as to Parcel C and remand the case to BLM for further consideration. It would appear that further land examination documenting the history and state of the cabin is in order. BLM should then readjudicate the validity of Vanderpool's application for Parcel C.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside. The case is remanded to BLM for initiation of a contest against Native allotment application AA-51175 with respect to Parcel B and

for further consideration of the validity of the allotment with respect to Parcel C.

David L. Hughes
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge